IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA	)	2d Crim. B206146
Plaintiff and Respondent,	)	(Sup.Ct.No. BA328916)
v.	)	
ADAM FOSTER,	)	
Defendant and Appellant,	)	

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE CHARLES F. PALMER, JUDGE

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This appeal is from a final judgment after a no contest plea and is authorized by Penal Code section 1538.5, subdivision (m).

STATEMENT OF THE CASE

An information charged appellant, ADAM FOSTER, with the following three counts: (1) theft in violation of Penal Code section 484e, subdivision (d); (2) misdemeanor possession of a smoking device in violation of Health and Safety Code section 11364, subdivision (a); (3) receiving stolen property in violation of Penal Code section 496, subdivision (a). The information also alleged that appellant had served five prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). (C.T. pp. 41 - 43.)

Appellant made a motion to suppress pursuant to Penal Code section 1538.5. (C.T. pp. 102 - 104.) Although acknowledging that it was a "close case," the Superior Court denied appellant's motion because it found that "officer safety" concerns justified the immediate patdown of appellant. (C.T. p. 107; R.T. pp. 22 - 23.) Appellant waived his constitutional rights and pled no contest to count 1. (C.T. pp. 108 - 109; R.T. pp. 26 - 29.) The court sentenced appellant to the low-term of sixteen months. The court awarded appellant 148 days of actual custody credit plus 74 days of good time/work time credit, for a total presentence credit of 222 days. On the prosecutor's motion, the court dismissed the remaining counts. (C.T. pp. 109 - 111; R.T. pp. 29 - 31.) Appellant filed a timely notice of appeal from the denial of his motion to suppress. (C.T. p. 112.)

STATEMENT OF FACTS

On August 9, 2007, at 1:30 a.m., Los Angeles Police Officer Fred Williams observed appellant riding a bicycle without a headlight in violation of Vehicle Code section 21201. He and his partner stopped appellant in order to issue a citation. Upon making contact with appellant, Williams ordered appellant to get off his bicycle. When appellant complied, Williams' partner immediately went to pat appellant down for "officer safety." Just before doing so, Williams' partner asked appellant if he had anything that was going to stick the officer. Appellant replied that he had a pipe. Williams took this to mean that he had a crack pipe. Williams' partner recovered a crack pipe, prompting Williams to arrest appellant. During a subsequent full search, Williams found six credit cards, belonging to six different people, in appellant's right pocket. The entire stop took place in public view and the area was well lit by the light from an open gas station. (R.T. pp. 3 - 7, 9 - 11.)

Williams testified on direct that appellant was patted down because the stop occurred in an area (Florence and Normandie) known for having a high incidence of violent crime; it occurred in the early morning hours; and because appellant was wearing baggy clothing. (R.T. p. 4.) On cross-examination Williams testified that he did not suspect appellant of having committed a crime other than riding a bicycle without a headlight. (R.T. pp. 7 - 8.) He further testified that the patdown had nothing to do with the fact appellant was riding a bicycle and that such an infraction is not inherently violent.

As for appellant himself, the officer testified that appellant did not make any furitive gestures; he was not nervous; and the officer did not see any bulge under appellant's clothing. Williams just assumed, for officer safety purposes, that appellant was armed. (R.T. pp. 12 - 12.)

ARGUMENT

CONTRARY TO THE SUPERIOR COURT'S OPINION, THIS WAS NOT A "CLOSE CASE" – GIVEN THE UTTER LACK OF REASONABLE SUSPICION THAT APPELLANT WAS ARMED, THE EVIDENCE CLEARLY SHOULD HAVE BEEN SUPPRESSED AS THE FRUIT OF AN UNCONSTITUTIONAL PATDOWN SEARCH.

Even though Officer Fred Williams unequivocally testified that he had no reason to suspect appellant was armed and dangerous, the Superior Court found the scales of Fourth Amendment jurisprudence tipped in favor of upholding the patdown in this "close case." If the Fourth Amendment does indeed permit the patdown in this case, then anyone stopped in a high crime area, at night, while wearing baggy clothes is subject to a patdown no matter the reason for the initial stop. Let us hope that the fears spawn from the tragic events of 9/11 have not lead us to a place where courts have essentially written the Fourth Amendment out of the Constitution, for under no reasonable interpretation of *Terry v. Ohio* (1968) 392 U.S. 1, 27 - 29 [20 L.Ed.2d 889, 88 S.Ct. 1868] and its progeny, can the search in this case be upheld.

A. General Fourth Amendment Principles.

On review from a motion to suppress made pursuant to Penal Code section 1538.5, the trial court's factual findings, "whether express or implied, must be upheld if they are supported by substantial evidence." (*People v. Lawler* (1973) 9 Cal.3d 156, 160.) Because the reasonableness of a search is an issue of law, however, an appellate

court should conduct an independent review of the trial court's conclusion. (*Ibid.;* see also *People v. Loewen* (1983) 35 Cal.3d 117, 123.) If the search or seizure in question does not satisfy the constitutional standard of reasonableness mandated by the Fourth Amendment, then the evidence seized should have been excluded. (*People v. Gallant* (1990) 225 Cal.App.3d 200, 206, citing *Mapp v. Ohio* (1961) 367 U.S. 643, 655 [6 L.Ed.2d 1081, 81 S.Ct. 1684].)

The touchstone of the Fourth Amendment is reasonableness. Courts are, therefore, required to evaluate a search "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." (See *Wyoming v. Houghton* (1999) 526 U.S. 295, 300 [143 L.Ed.2d 408, 119 S.Ct. 1297].) A warrantless search is presumptively unreasonable, and therefore unconstitutional, unless it falls within one of the recognized exceptions to the warrant requirement. (*Katz v. United States* (1967) 389 U.S. 347, 357 [19 L.Ed.2d 576, 88 S.Ct. 507]; *People v. Bravo* (1987) 43 Cal.3d 600, 609; *People v. Downing* (1995) 33 Cal.App.4th 1641, 1650.) The burden of proving that the search falls within one of these narrow exceptions rests with the People. (*People v. Williams* (1999) 20 Cal.4th 119, 127.)

B. Since There Was No Arrest, There Could Be No Search Incident Thereto.

As a preliminary matter, appellant notes that the search incident to a lawful arrest exception does not apply to the warrantless search in this case. While it does not appear to have been the basis for the Superior Court's decision to deny appellant's motion to suppress, the prosecutor did argue that because *Atwater v. City Of Lago Vista* (2001) 532 U.S, 318 [149 L.Ed.2d 549, 121 S.Ct. 1536] allowed the officer to arrest appellant for riding a bicycle without a headlamp, the officer could search appellant under the search incident to a lawful arrest exception. (R.T. p. 15.) Because there was yet to be an actual arrest, however, the prosecutor's argument that appellant could be searched incident thereto was plainly wrong.

Under the California Supreme Court's interpretation of *Atwater* in *People v. McKay* (2002) 27 Cal.4th 601, the police may arrest someone for any infraction no matter how minor. This is true, for Fourth Amendment purposes at least, even if state law does not permit an arrest for the infraction. Thus, even though state law would have only permitted an arrest in this case if appellant did not have his driver's license on him, an arrest for the Vehicle Code infraction still would have been constitutional.

Clearly, Officer Williams had probable cause to stop appellant for a Vehicle Code violation and, therefore, could have arrested him. But he did not do so. Without an actual arrest, Officer Williams could not conduct a full-blown search incident thereto. (*United States v. Robinson* (1973) 414 U.S. 218, 234 - 235 [38 L.Ed.2d 427, 94 S.Ct.

467]; *United States v. Belton* (1981) 453 U.S. 454, 460 - 461.) The United States Supreme Court's unanimous decision in *Knowles v. Iowa* (1998) 525 U.S. 113 [142 L.Ed.2d 492 119 S.Ct. 484] makes it abundantly clear that an officer cannot conduct a search incident to issuing a traffic citation.[1] Further, it is not enough that the officer could have arrested, there actually has to be an arrest.[2] (*Id.,* at pp. 117 - 119.) Finally, "[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." (*Sibron v. New York* (1968) 392 U.S. 40, 63 [20 L.Ed.2d 917, 934, 88 S.Ct. 1889, 1902].) Thus, the fact the patdown turned up contraband does not serve to

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[1]/ In both *Atwater* and *McKay*, where the search was upheld, the officer arrested the defendant prior to conducting the search. In *Knowles,* where the search was held to be unconstitutional, there was no arrest. Further, *Atwater* does not discuss the holding in *Knowles* at all. Finally, in the unnecessary portion of the opinion in *McKay* (*People v. McKay, supra,* 27 Cal.4th at p. 628 (Werdegar, J., concurring) [finding that state law permitted arrest made it unnecessary to address federal claim]), the Court stated that if federal permits an arrest, then the search incident to an arrest exception applies even if the search ran afoul of state law. (*Id.,* at p. 618.) The Court said nothing, however, about permitting a warrantless search in a situation where the officer could arrest under the Fourth Amendment but did not actually arrest.

[2]/ Respondent may argue that, even though *Atwater* did not discuss *Knowles*, it impliedly overruled *Knowles.* The Supreme Court itself has addressed this very argument:

> "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (*Rodriguez de Quijas v. Shearson/American Exp., Inc.* (1989) 490 U.S. 477, 484 [104 L.Ed.2d 526, 109 S. Ct. 1917].)

Hence, since *Knowles* specifically applies to searches following a stop for a minor traffic infraction, it is the opinion which directly applies and must be followed by this Court.

justify the otherwise unconstitutional search. Since there was antecedent arrest, the search incident to a lawful arrest exception simply does not apply in this case. (See *Mapp v. Ohio, supra,* 367 U.S. at p. 649 [absent a lawful arrest, police may not conduct a warrantless, full body, search of a suspect].)

C. Without A Doubt, The Patdown In This Case Ran Afoul Of The Principles Of Terry v. Ohio And Its Progeny.

It is well established that, under the Fourth Amendment, a police officer may temporarily detain a citizen if the officer has knowledge of specific and articulable facts which cause him to suspect that (1) some criminal activity has taken place or is occurring or is about to occur, and (2) the person he intends to stop or detain is involved in that activity. (*Terry v. Ohio, supra,* 392 U.S. at p. 21; *In re Tony C.* (1978) 21 Cal.3d 888, 892.) Even if the stop is reasonable under *Terry*, an officer is only permitted to pat down the individual for weapons if the officer reasonably believes the individual may be armed and dangerous. (*Terry v. Ohio, supra,* 392 U.S. at p. 27; *Adams v. Williams* (1972) 407 U.S. 143, 146 [32 L.Ed.2d 612, 92, S.Ct. 1921].) "The officer must be able to point to specific and articulable facts together with rational inferences therefrom which reasonably support a suspicion that the suspect is armed and dangerous." (*People v. Dickey* (1994) 21 Cal.App.4th 952, 956, citing *Terry v. Ohio, supra,* 392 U.S. at p. 29.) The purpose of a patdown search "is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. . . ." (*Adams v. Williams,*

supra, 407 U.S. at p. 146.) When, as in this case, no such specific and articulable facts are presented, the constitutionality of the patdown search cannot be upheld. (*Terry v. Ohio, supra*, 392 U.S. at p. 29.)

The Supreme Court in *Terry* clearly indicated that just because a detention is permitted does not automatically mean that a patdown is also permissible. Something more is needed and that something more was lacking in this case. Officer Williams and his partner needed to have a reasonable suspicion that appellant was armed and dangerous prior to patting him down. They clearly did not.

After appellant complied with the order to dismount his bicycle, he was immediately patted down. (R.T. p. 11.) The officer did not cite any specific reasons for why he suspected appellant was armed and dangerous. Instead, he testified that he had to assume appellant was armed because of the area of the stop, the time of day, and because appellant was wearing baggy clothing. (R.T. p. 4.) None of these generic facts, alone or together, justified the patdown in this case.

In *People v. Dickey, supra*, 21 Cal.App.4th 952, the case relied upon by trial counsel, the officer approached the defendant who was driving a car that was stopped in the middle of the road. The officer asked Dickey for his driver's license. When Dickey could not produce identification, he was ordered out of the car. After Dickey twice refused to give consent to search the car, the deputy patted appellant down because

he was "nervous and sweating." The officer further "testified that even though [Dickey] was not 'aggressive' he '... potentially may have been armed.'" (*Id.*, at p. 955.)

Division Six specifically held that the following facts were insufficient to justify the patdown search: (1) Dickey had no identification; (2) he refused to consent to a search of his car; (3) he was nervous and sweating; and (4) the officer found baking powder in a film canister in Dickey's control. (*Id.*, at pp. 954 - 956.) The court held that none of these facts, considered alone or together, could cause an officer to reasonably believe Dickey might use a weapon against him. (*Id.*, at p. 956.) The court also concluded that an officer's statement that a suspect may have been armed adds nothing to the analysis. The officer needs to testify to "specific and articulable" facts that point to a reasonable suspicion the suspect is armed and dangerous before he may pat down the suspect. (*Ibid.*)

Similarly, in *People v. Medina* (2003) 110 Cal.App.4th 171, Division Six again found the police lacked the reasonable suspicion necessary to conduct a patdown search of an individual stopped for driving with a broken taillight at midnight. (*Id.*, at pp. 177 - 178.) In that case, the officer "conceded that there 'wasn't anything specific' about Medina that would have led him to believe he was armed." (*Id.*, at p. 177.) The People argued that the fact the stop occurred in a high crime area at night, was sufficient to give the officer reasonable suspicion Medina was armed. Citing numerous cases to the

contrary, the Court of Appeal disagreed and reversed the denial of Medina's motion to suppress. (*Id.*, at pp. 177 - 178.)

Here, all the officer knew prior to patting appellant down was the following: (1) appellant was riding a bicycle without a headlight; (2) the stop occurred at night; (3) it occurred in a high crime area; and (4) appellant was wearing baggy clothes. None of these innocuous facts, considered alone or together, lead to a reasonable suspicion appellant was armed and dangerous.

First, the Court of Appeal in *Medina* dealt with a similarly minor traffic violation, a broken taillight, and found such an offense in and of itself does not create a reasonable suspicion that the violator was armed and dangerous. (*Ibid.*) The Court of Appeal in *Dickey* also dealt with a minor traffic infraction and found the police lacked the reasonable suspicion necessary to pat down the detainee. (*People v. Dickey, supra,* 21 Cal.App.4th at p. 957.)

Second, the fact that the stop occurred at night did not create a reasonable suspicion that appellant was armed and dangerous. (See *People v. Medina, supra,* 110 Cal.App.4th at pp. 177 - 178; *People v. Souza* (1994) 9 Cal.4th 224, 227; *People v. Bower* (1979) 24 Cal.3d 638, 645 [the time and location of the stop are insufficient to cast reasonable suspicion on a detainee].) In addition, the importance of the time of day is greatly diminished in this case because the stop occurred in a well lit gas station parking lot. (R.T. p. 9.)

Third, the fact the stop occurred in a high crime area does not give rise to a reasonable suspicion that appellant was armed and dangerous. (See *People v. Medina, supra,* 110 Cal.App.4th at pp. 177 - 178; *People v. Garry* (2007) 156 Cal.App.4th 1100, 1111 - 1113 [mere presence in a high crime area is insufficient to create a reasonable suspicion].)

Fourth, the officer did not testify that appellant's baggy clothing in any way might have been concealing a weapon. Finally, even when considered together (*People v. Souza, supra,* 9 Cal.4th at p. 227), these facts do not add up to reasonable suspicion appellant was armed and dangerous. (*People v. Dickey, supra,* 21 Cal.App.4th at p. 956.)

More importantly, when these facts are considered in conjunction with the remainder of Officer Williams' testimony, it is clear that he and his partner lacked a reasonable and particularized suspicion that appellant was armed and dangerous. Specifically, the officer testified that he did not suspect appellant of having committed any crime other than riding a bicycle without a headlight; that the officer did not see a bulge under appellant's clothing; that appellant did not make any furitive gestures; and that appellant did not appear nervous. (R.T. pp. 7 - 12.) He also testified that he had to assume that appellant was armed and dangerous because of where and when the stop occurred. (R.T. p. 4.) In other words, Williams and his partner did not reasonably suspect appellant was armed and dangerous when he was patted down, they just assumed that he was armed. As the Supreme Court has made clear, reasonable suspicion does not

exist where an officer can articulate only "an 'inchoate and unparticularized suspicion or 'hunch' of criminal activity.'" (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124 [145 L.Ed.2d 570, 120 S.Ct. 673].) As such, the police lacked the reasonable suspicion necessary to patdown appellant during this routine traffic stop.

D. "Officer Safety" Does Not Trump The Fourth Amendment In All Circumstances.

Every post-9/11 terrorist attack or officer shooting seems to take another bite out of the protections of the Fourth Amendment, as enunciated in *Terry.* It seems that all an officer need say on the witness stand is that he patted down the detainee for safety reasons and the defendant's motion to suppress is denied. The phrase "officer safety," however, is not an elixir that magically transforms an otherwise unconstitutional search into one that is constitutionally acceptable. If it were, a patdown would always be justified, day or night, because in every encounter the citizen is potentially armed. (*People v. Dickey, supra,* 21 Cal.App.4th at p. 957.) The requirement that the police testify to specific, articulable facts as the basis for their reasonable suspicion that a particular suspect was armed and dangerous is the only thing that keeps the police from having carte blanche to search everyone they stop in the name of "officer safety."

Thus, even when "officer safety" is the asserted justification for a warrantless patdown, the Fourth Amendment still requires that the search only be upheld if the officer testifies to "specific and articulable facts"; i.e., facts which support a

conclusion that he had reasonable cause to suspect the individual was armed and dangerous. In this case, there is no evidence which supports the conclusion that Officer Williams and his partner reasonably believed that appellant was armed and dangerous. Again, Officer Williams did not testify that he saw the outline of what might be a weapon under appellant's clothes. (See e.g., *United States v. Thomas* (9th Cir. 1988) 863 F.2d 622, 629 [if officer sees a suspicious bulge under clothing he may pat down suspect]; *United States v. Wilson* (9th Cir. 1993) 7 F.3d 828, 834 ["apparent possession of a heavy or bulky object on one side of his jacket" gave rise to reasonable suspicion].) Nor did he testify appellant was acting as if he had a weapon. (See e.g., *Ybarra v. Illinois* (1979) 444 U.S. 85, 92-93 [62 L.Ed.2d 238, 100 S.Ct 338] [no reasonable suspicion where defendant made no gestures to indicate he was armed]; *United States v. Laing* (D.C. Cir. 1989) 889 F.2d 281, 286 [reasonable suspicion found where suspect moved his hands to the front of his pants and fled].) Finally, as previously stated, the fact that appellant was detained at night in a high crime area is insufficient, by itself, to permit a patdown search. (See e.g., *People v. Medina, supra,* 110 Cal.App.4th at pp. 177 - 178 [the fact that the stop occurred in a high crime area at night insufficient to justify patdown].)

The Fourth Amendment requires courts to balance the interests of law enforcement against the interests of detainees. (*United States v. Knights* (2001) 534 U.S. 112, 118 - 119 [151 L.Ed.2d 497, 122 S.Ct. 587].) While many courts have recognized that "officer safety" is a legitimate factor weighing in favor of a warrantless search, the

United States Supreme Court has set forth a clear standard which an officer must satisfy before patting down a detainee. Even in this post-9/11, security above all else, era, if a police officer does not have a reasonable suspicion that the particular detainee is armed and dangerous, he cannot constitutionally pat him down. (*Terry v. Ohio, supra,* 392 U.S. at p. 27.) While it is probably prudent for an officer to always assume the person he contacts is armed, he cannot infringe upon that person's Fourth Amendment rights unless and until that assumption transforms into a reasonable suspicion. If the officer pats down the detainee before the officer has developed an individualized reasonable suspicion that the detainee is armed and dangerous, then the fruits of that unlawful search must be suppressed.

E. The Evidence Must Be Suppressed And Appellant's Conviction Reversed.

As the patdown search ran afoul of the Fourth Amendment, the fruits thereof, namely the drugs, should have been suppressed in accordance with the exclusionary rule. (*Mapp v. Ohio, supra,* 367 U.S. at p. 655; *Wong Sun v. United States* (1963) 371 U.S. 471, 485 - 488 [9 L.Ed.2d 441, 83 S.Ct. 407].) The Superior Court's failure to do so constitutes reversible error. When the reviewing court finds the search to be illegal, the judgment must be reversed and the cause remanded so that the defendant can be given the opportunity to withdraw his plea. (*People v. Ruggles* (1985) 39 Cal.3d 1, 13; *People v. Miller* (1983) 33 Cal.3d 545, 566 [the harmless error rule is inapplicable

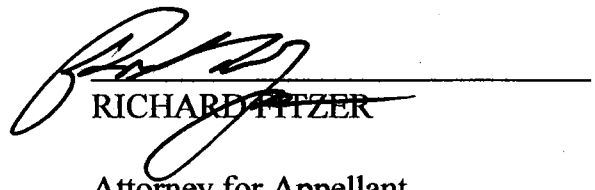
where the defendant has pled guilty following the erroneous denial of a motion to suppress].)

CONCLUSION

For the foregoing reasons, appellant respectfully requests this Court to find that the trial court erroneously denied his motion to suppress and, on that basis, reverse his conviction.

DATED: May 2, 2008

Respectfully submitted,



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WORD COUNT CERTIFICATION
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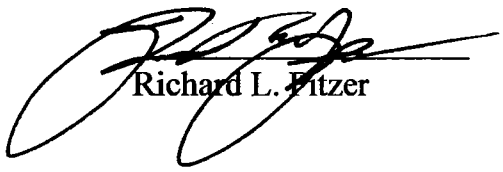
Court of Appeal No. B206146

I, Richard Fitzer, certify that this brief was prepared on a computer using Corel Word Perfect, and that, according to that program, this document contains 3,882 words.



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I am a citizen of the United States, over the age of 18 years, employed in Los Angeles County with my business address as stated above. I am not a party to this case. On May 2, 2008, I served the **Opening Brief,** a copy of which is attached, by mailing a copy to each addressee named below by regular United States mail at Long Beach, California.

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I declare under penalty of perjury that the foregoing is true and correct. Executed May 2, 2008 at Long Beach, California.

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